

RECEIVED

MAY 3 0 1997

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

DOCKET FILE COPY ORIGINAL

In the Matter of)

Implementation of Section 25 of the)
Cable Television Consumer)
and Competition Act of 1992,)
Direct Broadcast Satellite)
Service Obligations)

MM Docket No. 93-25

To: The Commission

**FURTHER REPLY COMMENTS OF
GE AMERICAN COMMUNICATIONS, INC.**

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby submits its reply to the supplemental comments of other parties filed in response to the Public Notice in the above-captioned proceeding, FCC 97-24 (rel. Jan. 31, 1997) ("*Public Notice*"). Specifically, GE Americom demonstrates that the public interest requirements imposed by Section 335 of the Communications Act apply to providers of direct-to-home ("DTH") programming, not to Part 25 satellite licensees.

INTRODUCTION

GE Americom should have no direct interest in this rulemaking to implement Section 335, which imposes program carriage requirements on providers of satellite-based video services to end users. GE Americom markets bulk satellite transponder capacity as a Part 25 space station licensee. GE Americom does not

No. of Copies rec'd 045
List ABCDE

offer DTH service or control the selection and distribution of DTH programming. When it began this proceeding four years ago, the Commission correctly recognized that Section 335's obligations apply to "parties that are engaged in various activities related to the delivery of video entertainment programming such as program packaging, program delivery, subscription billing and customer service."¹ GE Americom clearly does not fit that description.²

GE Americom is compelled to file here, however, because two of the supplemental comments submitted in response to the *Public Notice* challenge the Commission's interpretation of the statute.³ These parties simply restate arguments made four years ago in an attempt to suggest that the statutory language can be read to place the obligation for complying with Section 335 on Part 25 licensees, even when such licensees do not control the use of the satellite space segment to deliver DTH programming.

GE Americom provided a detailed response to these arguments in our 1993 Reply Comments in this docket.⁴ We will not repeat that discussion at length

¹ *Notice of Proposed Rulemaking, Implementation of Section 335 of the Cable Television Consumer Protection Act of 1992*, 8 FCC Rcd 1589, 1591 (1993) ("Notice").

² As the Commission knows, GE Americom leases transponders to Primestar Partners, L.P. ("Primestar"), which offers DTH programming to the public.

³ See Comments of Association of America's Public Television Stations and the Public Broadcasting Service at 30-36 (Apr. 28, 1997) (hereinafter, "APTS Comments"); Comments of Center for Media Education, *et al.* at 15-17 (Apr. 28, 1997) (hereinafter, "CME Comments").

⁴ Reply Comments of GE American Communications, Inc. (July 14, 1993) ("1993 GE Americom Reply Comments").

here. We assume that the Commission will refer back to our previous filing for our complete explanation of the statutory and policy reasons why the claims of APTS and CME are wrong. The following is a partial summary for the Commission's convenience, and to reemphasize the importance of rejecting the APTS/CME position.

I. THE STATUTORY LANGUAGE CLEARLY PLACES PROGRAM CARRIAGE OBLIGATIONS ON DTH DISTRIBUTORS, NOT THEIR TRANSPONDER VENDORS.

The attempts of APTS and CME to shift Section 335's program carriage obligations to Part 25 satellite licensees cannot be reconciled with the language of the statute. Congress defined a "provider of direct broadcast satellite service" for purposes of the program access requirements as:

(i) a licensee for a Ku-band satellite system under part 100 of title 47 of the Code of Federal Regulations; or

(ii) any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.

47 U.S.C. § 335(b)(5)(A).

Even the most cursory reading of these definitions indicates that Congress intended to reach DTH program service vendors irrespective of whether the vendor is a DBS licensee under Part 100, or a user of FSS satellites operated pursuant to Part 25. In the first case, the DBS licensee is directly held responsible for compliance with the program access obligations pursuant to subsection (i)

quoted above. Had Congress meant to place responsibility in the latter case on the satellite licensee, it could have used parallel language in subsection (ii). It did not, instead focusing on the “distributor” of video programming.⁵ By doing so, Congress created a level playing field among competitors, imposing the same obligations on all entities using Ku-band spacecraft to deliver DTH programming. See 1993 GE Americom Reply Comments at 2-7.

Likewise, APTS’ claim that the language of Section 335(b)(1) supports its interpretation is groundless. That Section states that channel capacity set asides must be applied by the Commission “as a condition of any provision, initial authorization or authorization renewal for a provider of direct broadcast satellite service providing video programming.” 47 U.S.C. § 335(b)(1). APTS contends that since the Commission authorizes only licensees, not the lessees of satellite capacity or programming suppliers, Section 335(b)(1) contemplates that the licensee will be the entity responsible for ensuring compliance. But APTS ignores the word “provision” in this section, which demonstrates that Congress intended this section to apply to entities other than those holding a Commission authorization.

Thus, Section 335(b)(1) actually is additional evidence that non-licensees can be subject to the carriage obligation when they use fixed Ku-band

⁵ Contrary to the assertion of APTS (at 31) the phrase “licensed under Part 25” in subsection (ii) clearly is intended to modify the phrase “fixed service satellite system” and does not refer back to the word “distributor.” In any event, APTS’ reading would mean that an entity would come within this definition section only if it was *both* a distributor of DTH video programming and a Part 25 satellite system licensee. No such entity currently exists.

satellites -- but only if and when they use the satellite capacity for DTH program service. Under subsection 335(b)(1) the carriage duty does not attach until the provider actually is "providing video programming." A Part 25 carrier licensee does not provide video programming, but a distributor of DTH programming does do so. Congress clearly intended to subject only the latter to the requirements of Section 335. See 1993 GE Americom Reply Comments at 7-8.

II. THE APTS AND CME ARGUMENTS WOULD LEAD TO UNREASONABLE AND IMPRACTICAL RESULTS.

APTS and CME also erroneously argue that subjecting Part 25 licensees to Section 335 will enhance the Commission's ability to enforce that provision's requirements. APTS Comments at 33-34; CME Comments at 16-17. This claim is inconsistent with the practical realities of the situation. Because a Part 25 licensee does not control the distribution of video programming services to users, it simply is not in a position to ensure compliance with Section 335. As Time Warner has recognized:

the statutory public interest obligations concern programming, not technical matters, and thus must be imposed on the entity responsible for selecting and packaging the DBS programming in order to be effective.

Comments of Time Warner Cable at 46 (Apr. 28, 1997) (emphasis in original).

As noted above, for example, GE Americom does not control the distribution of video programming over its spacecraft. It makes bare space segment available to customers who may (or may not) in turn use the space segment for

DTH -- or resell the capacity to others who may (or may not) do so. It follows that GE Americom is in no position to control the scope of the Section 335 program access obligation -- or even necessarily to know when and how much it comes into play.

In fact, subjecting an FSS satellite licensee to Section 335 would lead to absurd results. First, because the operator is not in the program distribution business, it has no distribution infrastructure to make available besides its space segment. In contrast, DTH MVPDs (whether using DBS or FSS) can incorporate program carriage obligations into their overall business plans and structure.

Second, the APTS/CME position would interfere with the ability of non-DTH customers to make efficient use of satellites. Under the APTS/CME interpretation of Section 335, a satellite operator's carriage obligations would shift based on how much of its capacity is being used for DTH at any given time. The satellite operator could be obliged to reclaim transponders from one user because an unrelated customer has created a Section 335 obligation based on that customer's decision to enter (or expand) its own DTH business. Hypothetically the satellite operator could set aside capacity in advance in anticipation that some customers might provide DTH, or reserve the right to reclaim capacity. But none of these approaches is efficient because none of them put the full consequences of the Section 335 obligation on the DTH provider who creates the carriage obligation in the first place.⁶

⁶ In theory, GE Americom could require by contract that any party using a GE Americom spacecraft for DTH service must comply with Section 335 using that

APTS and CME apparently believe that all these practical problems were ignored in the statute out of some view that enforcement is most easily directed at the satellite operator rather than the DTH vendor. This theory apparently turns on concerns regarding the Commission's jurisdiction over non-licensees. However, it is irrelevant that a DTH distributor using a Part 25 satellite may hold no Commission license.⁷ Section 335 itself clearly gives the Commission authority to take steps to ensure that video programming distributors comply with that Section's requirements. APTS itself admits that the Commission has the ability to impose forfeitures and issue cease and desist orders if non-licensees violate the Communications Act. APTS Comments at 33. Furthermore, the fact that the Commission has refrained from licensing receive-only DTH earth stations does not mean that the Commission lacks authority to establish rules governing communications with such antennas. APTS gives no reason why these measures,

customer's own leased space segment. But GE Americom would not even be in a position to monitor such compliance effectively, given its lack of information about or control over the programming decisions of DTH distributors. Direct Commission regulation of DTH programming distributors is clearly superior to reliance on such an attenuated enforcement mechanism. That is another reason why the Act places the responsibility for compliance on distributors, not on FSS operators. See 1993 GE Americom Reply Comments at 8-15.

However, if the Commission does place any Section 335 obligations on Part 25 licensees, it must permit such licensees to completely delegate those obligations pursuant to contract -- including revision of existing contracts with space segment customers. See 1993 Reply Comments at 16-17. CME agrees that such a delegation would be appropriate. CME Comments at 17.

⁷ In fact, a DTH distributor may hold licenses for the earth stations used to deliver video programming.

which permit the Commission to require termination of DTH service, would be insufficient to enforce Section 335.


CONCLUSION

Again, GE Americom has already discussed these issues in extensive detail in its original reply comments that remain part of the record of this proceeding. The statute clearly puts any program carriage obligation where it belongs -- on the DTH distributor whose activities trigger the obligation in the first place.

Respectfully submitted,

GE AMERICAN COMMUNICATIONS, INC.

Philip V. Otero
Senior Vice President and
General Counsel
GE American Communications, Inc.
Four Research Way
Princeton, NJ 08540

By: 
Peter A. Rohrbach
Karis A. Hastings
Cindy D. Jackson
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

May 30, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Further Reply Comments of GE American Communications, Inc. were served by hand delivery this 30th day of May, 1997 to:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

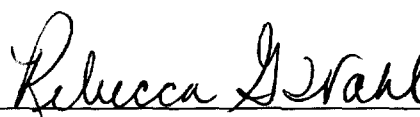
Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Ruth Milkman
Deputy Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 821
Washington, D.C. 20554

John Stern
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 819
Washington, DC 20054

Brian Carter
International Bureau
Federal Communications Commission
2000 M Street, N.W., Room 802
Washington, DC 20054


Rebecca G. Wahl